

Delaware Now Permits Exculpation of Corporate Officers

WRITTEN BY

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The Delaware General Corporation Law (§ 102(b)(7)) has been amended, effective August 1, 2022, to permit exculpation of corporate officers, but in a more limited way than the exculpation of directors that has long been permitted. Unlike directors, officers may be exculpated by a provision in the certificate of incorporation only from personal liability to stockholders, but not from an action by or in the right of the corporation. Officers are subject to the same limitations on exculpation that apply to directors (i.e., breach of the duty of loyalty, acts or omissions not in good faith or involving intentional misconduct or a knowing violation of law, and receipt of an improper personal benefit).

Exculpation of officers can be important because there has been a recent trend to include officers and others in breach of fiduciary duty lawsuits brought against directors, as well as to make claims against directors who also serve as officers in their capacity as officers.

Because the exculpation must be in the certificate of incorporation, stockholder action would be required for existing corporations to exculpate their officers. This may prove difficult for existing public corporations, at least until more experience develops. However, exculpation of officers should be considered for new corporations, corporations before they go public and any other corporation, such as controlled corporations, for which stockholder approval likely can be obtained.

The form of exculpation provision is likely to track the existing exculpation of directors, whether in a new provision covering officers or by modifying an existing provision that already covers directors. The following is a typical form of exculpation provision modified to include officers:

No director or officer of the Company shall be liable to the Company or its stockholders for monetary damages for breach of fiduciary duty as a director or officer, except to the extent such elimination or limitation of liability is not permitted under the Delaware General Corporation Law as presently in effect or as the same may hereafter be amended. No amendment or repeal of this provision shall apply to or have any effect on the liability of any director or officer of the Company for any acts or omissions of such director or officer occurring prior to such amendment or repeal.

The full text of the amendments to §102(b)(7), along with other changes made to the Delaware General Corporation Law at the same time, is available at [this link](#).

If you have any questions about these changes, your regular Locke Lord contact or any of the authors can discuss these matters with you.

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